No. 83-245

In the Supreme Court of the United States

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

R. A. GRAY & COMPANY,
Appellee

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of Amicus Curiae National Steel Service Center, Inc.

RALPH T. DESTEFANO*
RICHARD R. RIESE
THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-7776
**Counsel of Record*

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I. INTEREST OF AMICUS CURIAE

Amicus Curiae National Steel Service Center, Inc. writes in support of the position of the Appellee R. A. Gray & Company.[1] Written consent of the parties to Case No. 83-245 has been obtained for this appearance in accordance with United States Supreme Court Rule 36.2 and such written consent has been filed of record with the Clerk.

[1] *Amicus Curiae* National Steel Service Center, Inc. is plaintiff/appellee in *National Steel Service Center, Inc. v. Central States, Southeast and Southwest Areas Pension Fund et al.*, No. 82C-5315 (N.D. Ill. E.D. November 23, 1983) (McGarr, C.J.) appeal pending (7th Cir. No. 83-3298), which action seeks declaratory and injunctive relief based on the unconstitutionality of the retroactive effective date provisions of the Multiemployer Pension Plan Amendments Act of 1980 on the following facts of record therein: In November, 1978, National Steel Service Center, Inc. negotiated a multi-year collective bargaining agreement with the local union representing its employees which agreement called for the company to cease contributing to the Central States, Southeast and Southwest Areas Pension Fund effective August 1, 1980 and to begin coverage of its employees under a single employer pension plan with retirement benefits as negotiated with the union on behalf of the employees at its Oak Creek, Wisconsin facility.

II. ARGUMENT

The Retroactive Application of the Withdrawal Liability Provisions of the MPPAA Is An Unconstitutional Denial of Due Process Assured by the Fifth Amendment.

It is important to realize that the MPPAA regulates multiemployer plans of the "Taft-Hartley" variety. The plans are in reality creatures of collective bargaining between a union and several employers. Employee Retirement Income Security Act of 1974 ["ERISA"] 88 Stat. 829 *as amended by* Multiemployer Pension Plan Amendments Act of 1980, ["MPPAA"] 94 Stat. 1209 at 29 U.S.C. §1002(37); *Peick v. PBGC*, No. 82-2081 (7th Cir., December 19, 1983) Slip.Op. at p. 11.

Collective bargaining is, in turn, a statutory creation with forty-nine years of Congressional, administrative, and judicial precedent upon which employers, unions, and employees regularly rely in establishing the relationships and obligations among them. It is precedent which dictates the process to be accorded Appellee R. A. Gray & Company and other similarly situated employers. It is that process which has been unconstitutionally abrogated by making the MPPAA retroactively effective.

Collective bargaining is predicated on a statutory framework which, since its inception, has been recognized as providing a free opportunity to negotiate without compelling the content of the parties' adjustments or agreements. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). The forum of the bargaining table and the economic resources of the parties describe a process which legitimizes and promotes negotiation between employer and employee representatives to create their own ordering

of wages, benefits, terms, and conditions of employment, free from government dictation of a substantive resolution to their differences. *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 490 (1960); *Local 24, Int'l. Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). Clearly included within this bargaining process are the retirement benefits and pension rights of active employees. *Allied Chemical & Alkali Workers of Am., Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180-181 (1971).

The conduct of R. A. Gray & Company in bargaining with the union in 1980 was protected by federal labor policy. Gray gave appropriate notice to the union of its desire to terminate its current labor agreement upon its expiration. (J.A. 19) Correspondence over new proposals for a labor contract took place, including discussions of pension matters. No agreement was reached before the existing contract's termination. (J.A. 105, 156, 159, 160) Thereafter, Gray permissibly implemented its proposals "without prejudice to such agreement as future negotiations may produce." However, the Union did not maintain the support of the company's employees and no subsequent agreement was reached. Therefore, Gray's obligation to contribute to the Pension Plan permanently ceased as of June 1, 1980. Although a new bargaining agreement did not result, the process of good faith bargaining was observed and no unfair labor practice asperses this conclusion. Accordingly, this collective bargaining process result deserves due process protection against the *ex post facto* interference occasioned by the retroactively effective provisions of the MPPAA.

"For its own purposes, a government may find it convenient, sometimes indeed imperative, to signal its trustworthiness and thus to induce the sort of reliance that it could instead have spurned. When government makes that choice, a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*" L. Tribe, AMERICAN CONSTITUTIONAL LAW §9-7, at 490 (1978) (Emphasis in original). Transcending the impairment clause to protect individual reliance interests on government-countenanced procedures is the Due Process clause. *See e.g., Morton v. Ruiz,* 415 U.S. 199, 235 (1974); *Thorpe v. Housing Authority,* 393 U.S. 268 (1969); *Raley v. Ohio,* 360 U.S. 423 (1959); *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 422 (1942); *Arizona Grocery Co. v. Atchison, T. & S.F.R. Co.,* 284 U.S. 370 (1932).

The decades of Congressionally, administratively, and judicially encouraged reliance on the statutorily established freedom of parties engaged in the collective bargaining process to determine the substance of their obligations and liabilities warrants the protection of the Due Process clause against the ancillary assault mounted by the preenactment application of the MPPAA. Congress may not renege on its federal labor law word. Actions contemplated, taken, and consummated in accordance with long established and balanced federal rights may not be the basis for triggering extraordinary liabilities due to the retroactive effective date of chronologically subsequent Congressional action.

The MPPAA is primarily directed at the prevention of future pension plan failures and at prospective improvement of plan stability. *Peick v. PBGC, supra,* Slip.Op. at p. 36. *R. A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund,* 549 F.Supp. 531, 535-536 (D.Ore. 1982), *rev'd,* 705 F.2d 1502 (9th Cir. 1983), *prob. juris noted sub nom. Pension Benefit Guaranty Corp., v. R. A. Gray & Co.,* 52 U.S.L.W. 3308 (Oct. 17, 1983) (Nos. 83-245, 83-291). Such purposes are generally insufficient bases for retroactive legislation. *Usery v. Turner Elkhorn Mining,* 428 U.S. 1, 17 (1976). Retroactivity therefore is predicated on deterring "opportunistic" employers from withdrawing in anticipation of legislation.[2] The pejorative label, "opportunistic", ignores the mutuality of collective bargaining. Employers are not free to unilaterally alter their labor agreement obligations. Nor may an employer negotiating a new agreement act unilaterally without first engaging in good faith bargaining to impasse. *NLRB v. Katz,* 369 U.S. 736 (1962). The Congressional hypotheses of unprincipled opportunism and massive withdrawals are not plausible in the real world of collective bargaining.

MPPAA retroactivity is not the mere upset of otherwise settled private expectations. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. at 16. For *Turner Elkhorn Mining* is distinguishable and its deferential standard is inapplicable where there is affirmative Federal endorsement of the type

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[2]The element of reasonable anticipation is a minimally necessary, but not sufficient, element of a retroactive enforcement scheme, *Welch v. Henry,* 305 U.S. 134, 147 (1938), particularly where deterence is intended. *United States v. Peltier,* 422 U.S. 531 (1975). Compare, *National Steel Service Center, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, supra.*

of private conduct and expectations implicated here. Collective bargaining is a special case. This is not to argue that freedom of collective contract is inviolate. Congress has from time to time passed ancillary laws which impinge on the substantive terms of collective bargaining agreements—but not retroactively. *See e.g.*, ERISA, 29 U.S.C. §1061(c)(1) and §1086(c)(1); *see also, Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 382 (1980); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Jewel Ridge Coal Corp. v. Local No. 6167, UMWA*, 325 U.S. 161 (1945).

The preenactment enforcement of the MPPAA to assess liability upon bargaining activity otherwise federally protected when it occurred, or upon action taken in accordance with a collective bargaining agreement which has been fully performed, does inexcusable violence to the rights of R. A. Gray & Company and other similarly situated employers. It is this due process within the federally demarcated bounds of the economic forum of labor relations which has been unconstitutionally abrogated by MPPAA retroactive enforcement. Therefore, the Court should declare null and void the retroactively effective provision of the MPPAA and uphold the half century of precedent which supports the American collective bargaining system.

III. CONCLUSION

Based on the argument above and the arguments of Appellee R. A. Gray & Company and the supporting *amici curiae*, the judgment of the Court below must be affirmed.

Respectfully submitted,

RALPH T. DESTEFANO
RICHARD R. RIESE
THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-7776